for the benefit of himself and family, such personal property as he may have, and coming within the exemption hereby made. But this section shall not be construed as authorizing the General Assembly to defeat or impair the benefits intended to be conferred by the provisions of this article.

By an Act of June 27th 1870 the General Assembly, in accordance with section 5 of the foregoing article of the Constitution, prescribed the mode of setting apart exempted property. By this act the debtor may waive the benefit of the exemptions given by the Constitution, but not those under the Act of 1867. The mode of setting apart the homestead, &c., is elaborately provided for.

J. H. THOMAS,
Savannah, Ga.

(*To be concluded in the next number.*)

RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Maine.

CHARLES W. GODDARD *v.* THE GRAND TRUNK RAILWAY.

A common carrier of passengers is responsible for the wilful misconduct of his servant toward a passenger.

A passenger who is assaulted and grossly insulted in a railway car by a brakeman employed on the train, has a remedy therefor against the company.

If a brakeman, employed on a railway passenger train, assault and grossly insult a passenger thereon, and the company retain the offending servant in their service after his misconduct is known to them, they will be liable to exemplary damages.

The plaintiff, a highly respectable citizen, and a passenger in the defendants' railway car, on request, surrendered his ticket to a brakeman authorized to demand and receive it. Shortly after, the brakeman, without provocation, approached the plaintiff in his seat, and, accosting him in a loud voice, denied, in the presence of the other passengers, that he had seen or received the plaintiff's ticket, and in language coarse, profane, and grossly insulting, called the plaintiff a liar, charged him with then attempting to evade the payment of his fare, and with having done so before; and leaning over the plaintiff, then in feeble health and partially reclining in his seat, and bringing his fist down close to his face, violently shook it there, and threatened to split the plaintiff's head open and to spill his brains right there on the spot, with much more to the same effect. The defendants, although well knowing the brakeman's misconduct, did not discharge him, but retained him in his place, which he continued to occupy at the time of the trial.

The jury was instructed that the case was a proper one for exemplary damages, and they returned a verdict for $4850, which the court declined to set aside.

On exceptions and motion to set aside the verdict as being excessive.

Trespass for an alleged assault by a servant of the defendants, in one of their cars, upon the plaintiff.

The jury returned a verdict for the plaintiff for $4850. And the defendants alleged exceptions.

G. F. Shepley, for the plaintiff.

P. Barnes, for the defendants, cited *Derby* v. *Penna. Railroad Co.*, 14 How. 468, and cases there cited; *Howe* v. *Newmarch*, 12 Allen 56; Reeves's Dom. Relations 356, 358; *Foster* v. *Essex Bank*, 17 Mass. 508; 2 Kent's Com. 259, 260; Story on Agency, § 318; *Brown* v. *Purviance*, 2 Harris & Gill 317; *Lyons* v. *Martin*, 8 Ad. & E. 514; *Thames Steamboat Co.* v. *Railroad Co.*, 24 Conn. 40; 1 Redfield on Railways 510–515; *Pote* v. *Dill*, 48 Maine 539, Rice's dissenting opinion; *Hagan* v. *Prov. & War. Railroad Co.*, 3 R. I. 188; *Turner* v. *N. B. & M. Railroad Co.*, 34 Cal. 594; *Pleasant* v. *N. B. & M. Railroad Co.*, 34 Cal. 586; *Finny* v. *Mil. & Wis. Railroad Co.*, 10 Wis. 338; *Clarke* v. *Newson*, 1 Exch. 131; *Montfort* v. *Wordsworth*, 7 Ind. 83; *Ripley* v. *Miller*, 11 Ind. 247.

The opinion of the court was delivered by

Walton, J.—Two questions are presented for our consideration: first, is the common carrier of passengers responsible for the wilful misconduct of his servant? or, in other words, if a passenger who has done nothing to forfeit his right to civil treatment, is assaulted and grossly insulted by one of the carrier's servants, can he look to the carrier for redress? and, secondly, if he can, what is the measure of relief which the law secures to him? These are questions that deeply concern, not only the numerous railroad and steamboat companies engaged in the transportation of passengers, but also the whole travelling public; and we have endeavored to give them that consideration which their great importance has seemed to us to demand.

I. Of the carrier's liability. It appears in evidence that the plaintiff was a passenger in the defendants' railway car; that, on request, he surrendered his ticket to a brakeman employed on the

train, who, in the absence of the conductor, was authorized to demand and receive it; that the brakeman afterwards approached the plaintiff, and, in language coarse, profane, and grossly insulting, denied that he had either surrendered or shown him his ticket; that the brakeman called the plaintiff a liar, charged him with attempting to avoid the payment of his fare, and with having done the same thing before, and threatened to split his head open and spill his brains right there on the spot; that the brakeman stepped forward and placed his foot upon the seat on which the plaintiff was sitting, and, leaning over the plaintiff, brought his fist close down to his face, and shaking it violently, told him not to yip, if he did he would spot him; that he was a damned liar, that he never handed him his ticket; that he did not believe he paid his fare either way; that this assault was continued some fifteen or twenty minutes, and until the whistle sounded for the next station; that there were several passengers present in the car, some of whom were ladies, and that they were all strangers to the plaintiff; that the plaintiff was at the time in feeble health, and had been for some time under the care of a physician, and at the time of the assault was reclining languidly in his seat; that he had neither said nor done anything to provoke the assault; that, in fact, he had paid his fare, had received a ticket, and had surrendered it to this very brakeman who delivered it to the conductor only a few minutes before, by whom it was afterwards produced and identified; that the defendants were immediately notified of the misconduct of the brakeman, but instead of discharging him, retained him in his place; that the brakeman was still in the defendants' employ when the case was tried, and was present in court during the trial, but was not called as a witness, and no attempt was made to justify or excuse his conduct.

Upon this evidence the defendants contend that they are not liable, because, as they say, the brakeman's assault upon the plaintiff was wilful and malicious, and was not directly nor impliedly authorized by them. They say the substance of the whole case is this, that "the master is not responsible as a trespasser, unless by direct or implied authority to the servant he consents to the unlawful act."

The fallacy of this argument, when applied to the common carrier of passengers, consists in not discriminating between the obligation which he is under to his passenger, and the duty which

he owes a stranger. It may be true that if the carrier's servant wilfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers. The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger; but he is bound to use all such reasonable precautions as human judgment and foresight are capable of, to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and co-passengers, but *a fortiori*, against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted through the negligence or the wilful misconduct of the carrier's servant, the carrier is necessarily responsible.

And it seems to us it would be cause of profound regret if the law were otherwise. The carrier selects his own servants and can discharge them when he pleases, and it is but reasonable that he should be responsible for the manner in which they execute their trust. To their care and fidelity are intrusted the lives and limbs and comfort and convenience of the whole travelling public, and it is certainly as important that these servants should be trustworthy as it is that they should be competent. It is not sufficient that they are capable of doing well, if in fact they choose to do ill; that they can be as polite as a Chesterfield, if, in their intercourse with the passengers, they choose to be coarse, brutal, and profane. The best security the traveller can have that these servants will be selected with care, is to hold those by whom the selection is made responsible for their conduct.

This liability of the master is very clearly expressed in a recent case in Massachusetts. The court say, that wherever there is a contract between the master and another person, the master is responsible for the acts of his servant in executing that contract,

although the act is fraudulent and done without his consent: *Howe* v. *Newmarch*, 12 Allen 55.

And Messrs. Angell & Ames, in their work on Corporations (section 388, p. 404, 8th ed.), say: "A distinction exists as to the liability of a corporation for the wilful tort of its servant toward one to whom the corporation owes no duty except such as each citizen owes to every other; and that toward one who has entered into some peculiar contract with the corporation by which this duty is increased; thus it has been held that a railroad corporation is liable for the wilful tort of its servants whereby a passenger on the train is injured."

In *Brand* v. *Railroad*, 8 Barb. 368, the court say: "A passenger on board a stage-coach or railroad-car and a person on foot in the street do not stand in the same relation to the carrier. Toward the one the liability of the carrier springs from a contract, express or implied, and upheld by an adequate consideration. Toward the other he is under no obligation but that of justice and humanity. Hence a passenger, who is injured by a servant of the carrier, may have a right of action against him when one not a passenger, for a similar injury, would not."

In *Moore* v. *Railroad*, 4 Gray 465, the plaintiff was forcibly put out of a car for not giving up his ticket or paying his fare, when in fact he had already surrendered his ticket to some one employed on the train. The defendants insisted that they were not responsible for the misconduct of the conductor; and further, that an action for an assault would not lie against a corporation. But the court held otherwise, and the plaintiff recovered.

In *Seymour* v. *Greenwood*, 7 H. & N. 354, the plaintiff was assaulted and taken out of the defendant's omnibus by one of his servants. The defendant insisted that he was not liable, because it did not appear that he authorized or sanctioned the act of the servant. But it was held in the Exchequer Chamber, affirming the judgment of the Exchequer Court, that the jury did right in returning a verdict for the plaintiff.

In *Railroad* v. *Finney*, 10 Wis. 388, the plaintiff was unlawfully put out of a car by the conductor. After stating that it was insisted, by the counsel for the railroad, that in no case could a cause of action arise against the principal for the wilful misconduct of the agent, the court went on to say that, after a careful examination of the position, they were satisfied it was not

correct; that where the misconduct of the agent causes a breach of the principal's contract, he will be liable whether such misconduct be wilful or merely negligent.

In *Railroad* v. *Vandiver*, 42 Penn. St. R. 365, a passenger received injuries, of which he died, by being thrown from the platform of a railroad car because he refused to pay his fare or show his ticket, he averring he had bought one but could not find it. The evidence showed he was partially intoxicated. It was urged in defence that if the passenger's death was the result of force and violence, and not the result of negligence, then (such force and violence being the act of the agents alone without any command or order of the company), the company was not responsible therefor. But the court held otherwise. "A railway company," said the court, "selects its own agents at its own pleasure, and it is bound to employ none except capable, prudent, and humane men. In the present case the company and its agents were all liable for the injury done to the deceased."

In *Weed* v. *Railroad*, 17 N. Y. 362, the jury found specially that the act of the servant by which the plaintiff was injured was wilful. The court held the wilfulness of the act did not defeat the plaintiff's right to look to the railroad company for redress.

In *Railroad* v. *Derby*, 14 How. 468, where the servant of a railroad company took an engine and ran it over the road for his own gratification, not only without consent, but contrary to express orders, the Supreme Court of the United States held that the railroad company was responsible.

In *Railway* v. *Hinds*, 7 Am. Law Reg. N. S. 14, a passenger's arm was broken in a fight between some drunken persons that forced their way into the car at a station near an agricultural fair, and the company was held responsible, because the conductor went on collecting fares, and did not stop the train and expel the rioters, or demonstrate, by an earnest effort, that it was impossible to do so.

In *Flint* v. *Transportation Company*, 34 Conn. 554, where the plaintiff was injured by the discharge of a gun dropped by some soldiers engaged in a scuffle, the court held that passenger carriers are bound to exercise the utmost vigilance and care to guard those they transport from violence from whatever source arising; and the plaintiff recovered a verdict for $10,000.

In *Landreaux* v. *Bell*, 5 Louisiana, O. S. 275, the court say,

that carriers are responsible for the misconduct of their servants toward passengers to the same extent as for their misconduct in regard to merchandise committed to their care; that no satisfactory distinction can be drawn between the two cases.

In *Chamberlain* v. *Chandler*, 3 Mason 242, Judge STORY declared in language strong and emphatic, that a passenger's contract entitles him to respectful treatment; and he expressed the hope that every violation of this right would be visited, in the shape of damages, with its appropriate punishment.

In *Nieto* v. *Clark*, 1 Cliff. 145, where the steward of the ship assaulted and grossly insulted a female passenger, Judge CLIFFORD declares, in language equally emphatic, that the contract of all passengers entitles them to respectful treatment and protection against rudeness and every wanton interference with their persons from all those in charge of the ship; that the conduct of the steward disqualified him for his situation, and justified the master in immediately discharging him, although the vessel was then in a foreign port. And we have his authority for saying that he has recently examined the question with care, in a case pending in the Rhode Island district, where the clerk of a steamboat unjustifiably assaulted and maltreated a passenger, and that he entertains no doubt of the carrier's liability to compensate the passenger for the injury thus received, whether the carrier previously authorized or subsequently ratified the assault or not. A report of the case will soon be published. (See 3 Clifford.)

And a recent and well-considered case in Maryland (published since this case has been pending before the law court, and very much like it in all respects), fully sustains this view of the law: *Railroad* v. *Blocher*, 27 Md. 277.

The grounds of the carrier's liability may be briefly stated thus:—

The law requires the common carrier of passengers to exercise the highest degree of care that human judgment and foresight are capable of, to make his passenger's journey safe. Whoever engages in the business impliedly promises that his passenger shall have this degree of care. In other words, the carrier is conclusively presumed to have promised to do what, under the circumstances, the law requires him to do. We say conclusively presumed, for the law will not allow the carrier by notice or special contract even to deprive his passenger of this degree of care. If the

passenger does not have such care, but on the contrary is unlawfully assaulted and insulted by one of the very persons to whom his conveyance is intrusted, the carrier's implied promise is broken, and his legal duty is left unperformed, and he is necessarily responsible to the passenger for the damages he thereby sustains. The passenger's remedy may be either in assumpsit or tort, at his election. In the one case, he relies upon a breach of the carrier's common-law duty in support of his action; in the other, upon a breach of his implied promise. The form of the action is important only upon the question of damages. In actions of assumpsit, the damages are generally limited to compensation. In actions of tort, the jury are allowed greater latitude, and in proper cases, may give exemplary damages.

II. We now come to the second branch of the case. What is the measure of relief which the law secures to the injured party; or, in other words, can he recover exemplary damages? We hold that he can. The right of the jury to give exemplary damages for injuries wantonly, recklessly, or maliciously inflicted, is as old as the right of trial by jury itself; and is not, as many seem to suppose, an innovation upon the rules of the common law. It was settled in England more than a century ago.

In 1763, Lord Chief Justice PRATT (afterwards Earl of Camden), with whom the other judges concurred, declared that the jury had done right in giving exemplary damages: *Huckle* v. *Money*, 2 Wils. 205.

In another case the same learned judge declared with emphasis, that damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty: Campbell's Lives of the Chancellors, Am. ed., vol. 5, p. 214.

In 1814, the doctrine of punitive damages was stringently applied in a case where the defendant, in a state of intoxication, forced himself into the plaintiff's company, and insolently persisted in hunting upon his grounds. The plaintiff recovered a verdict for five hundred pounds, the full amount of his *ad damnum*, and the court refused to set it aside. Mr. Justice HEATH remarked in this case that he remembered a case where the jury gave five hundred pounds for merely knocking a man's hat off, and the court refused a new trial. It goes, said he, to prevent the practice of duelling, if juries are permitted to punish insult by exemplary

damages: *Merest* v. *Harvey*, 5 Taunt. 442. See also, to the same effect, *Sears* v. *Lyon*, 2 Stark. 317, decided in 1818.

In 1844, Lord Chief Baron POLLOCK said, that in actions for malicious injuries, juries had always been allowed to give what are called vindictive damages: *Doe* v. *Filliter*, 13 M. & W. 50.

In 1858, in an action of trespass for taking personal property on a fraudulent bill of sale, the defendant's counsel contended that it was not a case for the application of the doctrine of exemplary damages; but the court held otherwise. No doubt, said POLLOCK, C. B., it was a case in which vindictive damages might be given: *Thomas* v. *Harris*, 3 H. & N. 961.

In 1860, in an action for wilful negligence, the defendant contended that the plaintiff's declaration was too defective to entitle him to exemplary damages; but the court held otherwise; and the judge who tried the case remarked that he was glad the court had come to the conclusion that it was competent for the jury to give exemplary damages, for he thought the defendant had acted with a high hand: *Emblen* v. *Myers*, 6 H. & N. 54.

"Damages exemplary," is now a familiar title in the best English law reports. See 6 H. & N. 969.

It was the firmness with which Lord CAMDEN (then Chief Justice PRATT) maintained and enforced the right of the jury to punish with exemplary damages the agents of Lord Halifax (then Secretary of State) for the illegal arrest of the publishers of the North Briton, that made him so immensely popular in England. Nearly or quite twenty of those cases appear to have been tried before him, in all of which enormous damages were given, and in not one of them was the verdict set aside. In one of the cases a verdict for a thousand pounds was returned for a mere nominal imprisonment at the house of the officer making the arrest, and the court refused to set it aside: *Beardmore* v. *Carrington*, 2 Wils. 244.

"After this," says Lord CAMPBELL, in his Lives of the Chancellors, "he became the idol of the nation. Grim representations of him laid down the law from sign-posts, many busts and prints of him were sold not only in the streets of the metropolis, but in the provincial towns; a fine portrait of him, by Sir Joshua Reynolds, with the flattering inscription, 'in honor of the zealous asserter of English liberty by law,' was placed in the Guildhall of the city of London; addresses of thanks to him poured in from

all quarters; and one of the sights of London, which foreigners went to see, was the great Lord Chief Justice PRATT."

In this country perhaps Lord CAMDEN is better known as one of the able English statesmen who so eloquently defended the American colonies against the unjust claim of the mother country to tax them. Lord CAMPBELL says some portions of his speeches upon that subject are still in the mouths of school-boys. But in England his immense popularity originated in his firm and vigorous enforcement of the doctrine of exemplary damages. And we cannot discover that the legality of his rulings in this particular was ever seriously called in question. On the contrary, we find it admitted by his political opponents that he was a profound jurist and an able and upright judge. His stringent enforcement of the right of the jury to punish flagrant wrongs with exemplary damages, arrested not only great abuses then existing, but it has had a salutary influence ever since. It won for him the title of the "asserter of English liberty by law."

In this country the right of the jury to give exemplary damages has been much discussed. It seems to have been first opposed by Mr. Theron Metcalf (afterwards reporter and judge of the Supreme Court of Massachusetts), in an article published in 3 American Jurist 387, in 1830. The substance of this article was afterwards inserted in a note to Mr. Greenleaf's work on Evidence. Mr. Sedgwick, in his work on Damages, took the opposite view, and sustained his position by the citation of numerous authorities. Professor Greenleaf replied in an article in the Boston Law Reporter, vol. 9, p. 529. Mr. Sedgwick rejoined in the same periodical, vol. 10, p. 49. Essays on different sides of the question were also published in 3 American Law Magazine, N. S. 537, and 4 American Law Magazine, N. S. 61. But notwithstanding this formidable opposition, the doctrine triumphed, and must be regarded as now too firmly established to be shaken by anything short of legislative enactments. In fact the decisions of the courts are nearly unanimous in its favor.

In a case in the Supreme Court of the United States Mr. Justice GRIER, in delivering the opinion of the court, says, it is a well-established principle of the common law that in all actions for torts the jury may inflict what are called punitive or exemplary damages, having in view the enormity of the offence rather than the measure of compensation to the plaintiff. "We

are aware," the judge continues, "that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument:" *Day* v. *Woodworth*, 13 How. 363.

In a case in North Carolina the court refer to the note in Professor Greenleaf's work on Evidence, and say that it is very clearly wrong with respect to the authorities; and in their judgment wrong on principle; that it is fortunate that while juries endeavor to give ample compensation for the injury actually received, they are also allowed such full discretion as to make verdicts to deter others from flagrant violations of social duty. And the same court hold that the wealth of the defendant is a proper circumstance to be weighed by the jury, because a thousand dollars may be a less punishment to one man than a hundred dollars to another. In one case the same court sustained a verdict which in terms assessed the actual damages at $100, and the exemplary damages at $1000. The court held it was a good verdict for $1100: *Pendleton* v. *Davis*, 1 Jones (N. C.) 98; *McAulay* v. *Birkhead*, 13 Iredell 28; *Gilreath* v. *Allen*, 10 Id. 67.

In fact, Professor Greenleaf is himself an authority for the doctrine of exemplary damages. Speaking of the action for assault and battery, he says the jury are not confined to the mere corporal injury, but may consider the malice of the defendant, the insulting character of his conduct, the rank in life of the several parties, and all the circumstances of the outrage, and thereupon award such exemplary damages as the circumstances may in their judgment require: 2 Greenl. on Ev. § 89.

But if the great weight of Professor Greenleaf's authority were to be regarded as opposed to the doctrine, we have, on the other hand, the great weight of Chancellor KENT'S opinion in favor of it. He says, surely this is the true and salutary doctrine. And after reviewing the English cases, he continues by saying it cannot be necessary to multiply instances of its application; that it is too well settled in practice, and too valuable in principle to be called in question: *Tillotson* v. *Cheetham*, 3 Johns. 56, 64.

This brief review of the doctrine of exemplary damages is not so much for the purpose of establishing its existence, as to correct the erroneous impression which some members of the legal profession still seem to entertain, that it is a modern invention, not

sanctioned by the rules of the common law. We think every candid-minded person must admit that it is no new doctrine; that its existence as a fundamental rule of the common law has been recognised in England for more than a century; that it has been there stringently enforced under circumstances which would not have allowed it to pass unchallenged, if any pretext could have been found for doubting its validity; and that in this country, notwithstanding an early and vigorous opposition, it has steadily progressed, and that the decisions of the courts are now nearly unanimous in its favor. It was sanctioned in this state, after a careful and full review of the authorities, in *Pike* v. *Dilling*, 48 Me. 539, and cannot now be regarded as an open question.

But it is said that if the doctrine of exemplary damages must be regarded as established in suits against natural persons for their own wilful and malicious torts, it ought not to be applied to corporations for the torts of their servants, especially where the tort is committed by a servant of so low a grade as a brakeman on a railway train, and the tortious act was not directly nor impliedly authorized nor ratified by the corporation; and several cases are cited by the defendants' counsel, in which the courts seem to have taken this view of the law; but we have carefully examined these cases, and in none of them was there any evidence that the servant acted wantonly or maliciously; they were simply cases of mistaken duty; and what these same courts would have done if a case of such gross and outrageous insult had been before them, as is now before us, it is impossible to say; and long experience has shown that nothing is more dangerous than to rely upon the abstract reasoning of courts, when the cases before them did not call for the application of the doctrines which their reasoning is intended to establish.

We have given to this objection much consideration, as it was our duty to do, for the presiding judge declined to instruct the jury that if the acts and words of the defendants' servant were not directly nor impliedly authorized nor ratified by the defendants, the plaintiff could not recover exemplary damages. We confess that it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations in their capacity of common carriers of passengers; and it might as well not be applied to them at all as to limit its application to cases where the servant

is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified; for no such cases will ever occur. A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands; and these minds and hands are its servants' minds and hands. All attempt, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation, is sheer nonsense, and only tends to confuse the mind and confound the judgment. Neither guilt, malice, nor suffering is predicable of this ideal existence called a corporation. And yet under cover of its name and authority there is in fact as much wickedness, and as much that is deserving of punishment, as can be found anywhere else. And since these ideal existences can neither be hung, imprisoned, whipped, or put in the stocks,—since in fact no corrective influence can be brought to bear upon them except that of pecuniary loss,—it does seem to us that the doctrine of exemplary damages is more beneficial in its application to them than in its application to natural persons. If those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants, will for a moment reflect upon the absurdity of their own thoughts, their anxiety will be cured. Careful engineers can be selected who will not run their trains into open draws; and careful baggage-men can be secured who will not handle and smash trunks and band-boxes as is now the universal custom; and conductors and brakemen can be had who will not assault and insult passengers; and if the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, we predict these great and growing evils will be very much lessened, if not entirely cured. There is but one vulnerable point about these ideal existences called corporations; and that is, the pocket of the moneyed power that is concealed behind them; and if that is reached they will wince. When it is thoroughly understood that it is not profitable

to employ careless and indifferent agents, or reckless and insolent servants, better men will take their places, and not before.

It is our judgment, therefore, that actions against corporations, for the wilful and malicious acts of their agents and servants in executing the business of the corporation, should not form exceptions to the rule allowing exemplary damages. On the contrary, we think this is the very class of cases, of all others, where it will do the most good, and where it is most needed. And in this conclusion we are sustained by several of the ablest courts in the country.

In a case in Mississippi the plaintiff was carried four hundred yards beyond the station where he had told the conductor he wished to stop; and he requested the conductor to run the train back, but the conductor refused, and told the plaintiff to get off the train or he would carry him to the next station. The plaintiff got off and walked back, carrying his valise in his hand. The plaintiff testified that the conductor's manner toward him was insolent, and the defendants having refused to discharge him, the jury returned a verdict for $4500, and the court refused to set it aside. They said the right of the jury to protect the public by punitive damages, and thus prevent these great public blessings from being converted into the most dangerous nuisances, was conclusively settled; and they hoped the verdict would have a salutary influence upon their future management: *Railroad* v. *Hurst*, 36 Miss. 660.

In New Hampshire, in an action against this identical road, where, through gross carelessness, there was a collision of the passenger train with a freight train, and the plaintiff was thereby injured, the judge at *Nisi Prius* instructed the jury that it was a proper case for exemplary damages; and the full court sustained the ruling, saying it was a subject in which all the travelling public were deeply interested; that railroads had practically monopolized the transportation of passengers on all the principal lines of travel, and there ought to be no lax administration of the law in such cases; and that it would be difficult to suggest a case more loudly calling for an exemplary verdict. [If mere carelessness, however gross, calls loudly for an exemplary verdict, what shall be said of an injury that is wilful and grossly insulting?] *Hopkins* v. *At. & St. Lawrence Railroad*, 36 N. Hamp. 9.

Judge REDFIELD, in his very able and useful work on railways,

expresses the opinion that there is quite as much necessity for holding these companies liable to exemplary damages as their agents. He says it is difficult to perceive why a passenger, who suffers indignity and insult from the conductor of a train, should be compelled to show an actual ratification of the act, in order to subject the company to exemplary damages: 2 Redfield on Railways 231, note. But if such a ratification is necessary, he thinks the corporation, which is a mere legal entity, inappreciable to sense, should be regarded as always present in the person of its servant, and as directing and ratifying the servant's acts within the scope of his employment, and thus be made responsible for his wilful misconduct: 1 Redfield on Railways 515 *et seq.*

And in a recent case in Maryland (published since this case has been pending before the law court), a case in all respects very similar to the one we are now considering, the presiding judge was requested to instruct the jury that the plaintiff was not entitled to recover vindictive or punitive damages from the defendants, unless they expressly or impliedly participated in the tortious act, authorizing it before or approving it after it was committed; but the presiding justice refused so to instruct the jury, and the full court held that the request was properly rejected; that it was settled that where the injury for which compensation in damages is sought is accompanied by force or malice, the injured party is entitled to recover exemplary damages: *Railroad* v. *Blocher*, 27 Md. 277.

But the defendants say that the damages awarded by the jury are excessive, and they move to have the verdict set aside and a new trial granted for that reason. That the verdict in this case is highly punitive, and was so designed by the jury, cannot be doubted; but by whose judgment is it to be measured to determine whether or not it is excessive? What standard shall be used? It is a case of wanton insult and injury to the plaintiff's character and feelings of self-respect, and the damages can be measured by no property standard. It is a case where the judgment will be very much influenced by the estimation in which character, self-respect, and freedom from insult are held. To those who set a very low value on character, and think that pride and self-respect exist only to become objects of ridicule and sport, the damages will undoubtedly be considered excessive. It would not be strange if some such persons, measuring the sensibilities

of others by their own low standard, should view this verdict with envy, and regret that somebody will not assault and insult them, if such is to be the standard of compensation. While others who feel that character and self-respect are above all price, more valuable than life itself even, will regard the verdict as none too large. We repeat, therefore, that it is a case where men's judgments will be likely to differ. And suppose the court is of opinion that the damages in this case are greater, much greater even, than they would have awarded, does it therefore follow that the judgment of the court is to be substituted for that of the jury? By no means. It is the wisdom of the law to suppose that the judgment of the jury is more likely to be right than the judgment of the court, for it is to the former and not to the latter that the duty of estimating damages is confided. Unless the damages are so large as to satisfy the court that the verdict was not the result of an honest exercise of judgment, they have no right to set it aside.

A careful examination of the case fails to satisfy us that the jury acted dishonestly, or that they made any mistake in their application of the doctrine of exemplary damages. We have no doubt that the highly punitive character of their verdict is owing to the fact that, after Jackson's misconduct was known to the defendants, they still retained him in their service. The jury undoubtedly felt that it was due to the plaintiff, and due to every other traveller upon that road, to have him instantly discharged; and that to retain him in his place, and thus shield and protect him against the protestation of the plaintiff, made to the servant himself at the time of the assault, that he would lose his place, was a practical ratification and approval of the servant's conduct, and would be so understood by him and by every other servant on the road.

And when we consider the violent, long-continued, and grossly insulting character of the assault; that it was made upon a person in feeble health, and was accompanied by language so coarse, profane, and brutal; that so far as appears it was wholly unprovoked; we confess we are amazed at the conduct of the defendants in not instantly discharging Jackson. Thus to shield and protect him in his insolence, deeply implicated them in his guilt. It was such indifference to the treatment the plaintiff had received, such indifference to the treatment that other travellers might receive,

such indifference to the evil influence which such an example would have upon the servants of this and other lines of public travel, that we are not prepared to say the jury acted unwisely in making their verdict highly punitive. We cannot help feeling that if we should interfere and set it aside, our action would be most unfortunate and detrimental to the public interests. On the contrary, if we allow it to stand, we cannot doubt that its influence will be salutary. It will be an impressive lesson to these defendants, and to the managers of other lines of public travel, of the risk they incur when they retain in their service servants known to be reckless, ill-mannered, and unfit for their places. And it will encourage those who may suffer insult and violence at the hands of such servants, not to retaliate or attempt to become their own avengers, as is too often done, but to trust to the law and to the courts of justice, for the redress of their grievances. It will say to them, be patient and law-abiding, and your redress shall surely come, and in such measure as will not add insult to your previous injury.

On the whole, we cannot doubt that it is best for all concerned that this verdict be allowed to stand.

The foregoing case is one of marked interest, on account of the very unusual misconduct and abuse of the plaintiff by the defendants' servant. We conjecture that no similar case of misconduct on the part of the conductor of a first class passenger train will be likely to occur here; and for the credit of the country, we trust it will not be regarded as presumptuous that we should predict, that no such case will ever again occur in our country. But as cases must be constantly liable to arise where the same principle as to the rule of damages will be raised, we have great satisfaction in being able to present our readers with what we regard as a very thorough and satisfactory exposition of the law of the question.

We should scarcely expect to be able to afford much aid toward solving the question, in addition to what we have already attempted in another place, referred to in the opinion of Mr. Justice WALTON. It is scarcely possible to conceive that any jury, or court, would ever be able to fix upon any rule of damages in actions for torts, and especially for personal injury of an aggravated and insulting character, without having more or less reference to the circumstances attending the transaction. There is a degree of pain and suffering, to a person of delicacy and sensitive feelings, where an injury is wantonly and brutally inflicted, which it is impossible to separate from the injury itself; which is, indeed, a part of it, and the principal part, and which thus renders it indispensable to measure the compensation awarded by way of damages largely by it, in order to meet, in any just sense, the real merits of the case. We believe that the most plausible argument against giving damages, by way of example, or punishment, has arisen more from the terms

used in expressing such claims, than from any innate infirmity in the claim for having damages awarded, in such cases, somewhat beyond the mere pecuniary loss sustained by the plaintiff. It is quite conceivable that a man might, by way of simple assault and insult, suffer so severely as to have it become the proximate cause of death, even where his person or property was not really deteriorated one cent. From this extreme supposed case, there will be found a regular gradation till we come into the class of torts altogether unintentional, such as come from mistake, or accident, or forgetfulness, or negligence. And in all these cases the primary basis of awarding damages unquestionably is the actual wrong and injury perpetrated by the defendant upon the plaintiff. The manner and motive of the defendant are essential media of measuring the wrong and injury to the plaintiff. It is impossible to measure the plaintiff's damage except through such media. The same thing done in one manner, and from one motive, is indifferent to us, so that we almost forget it in an hour; and when done differently, in these respects, becomes absolutely intolerable, so that no amount of money is any compensation whatever, and we never can forget and scarcely forgive it to our dying day. So that juries, in giving damages entirely beyond the actual pecuniary detriment to the plaintiff, will not be required to have any reference to meting out punishment to the defendant, or making the case an example to others. But, no doubt, even these considerations will more or less enter into verdicts upon cases of wanton and unprovoked injuries. The verdict, in such cases, as matter of the simplest justice, should solve all doubtful questions against the party solely in the wrong. There will always be considerations connected with the remedy for personal wrongs by suit in court, which, if divided equally between the parties, must render merely compensatory damages for the personal injury wholly inadequate as a redress. The expense of counsel fees, which it is well settled cannot be included in the verdict, and of personal attention to the suit, and mental anxiety in regard to it, are generally far beyond the mere pecuniary damage to the person. And these, although not proper elements of the verdict, ought not to be wholly overlooked.

All that is really meant, then, by exemplary or punitive damages is, that such ample and adequate redress shall be awarded the plaintiff as to admonish all others, tempted to commit similar outrages upon the rights of others, that it will prove an expensive experiment, and probably be attended with such incidental punishment as to deter all prudent men from its undertaking. The effect of verdicts in such cases should be to deter offenders from repeating their offences, and to encourage the injured party to seek redress in that form.

There is no fair question that damages cannot properly be awarded one man, solely upon the ground of punishing another, or of making a public example of his case. But every man should obtain such redress in courts as will not tend to discourage resort to such remedy. Whenever the verdicts of juries in cases of this character are so far reduced as to become an insult instead of a cure for the wrong, the people will take the matter into their own hands, and the injured party and his friends will seek redress in the court of Judge Lynch.

The administration of the law in the regularly constituted tribunals of the country should be so conducted as "to become a terror to the evil-doer, and a praise to them that do well." And this cannot be accomplished, in cases of this character, by merely nominal verdicts, or those that give only the pecuniary loss sustained by the plaintiff, which is

nothing more than dividing the expenses of the suit between the parties.

The following notes upon some recent decisions upon the point may be of some interest to the profession, although they do not, we confess, throw much light upon the points in dispute.

In *Louisville and Portland Railroad Co.* v. *Smith*, 2 Duvall 556, a horse-car was upset and thrown down an embankment, whereby the plaintiff, a passenger, was severely cut and bruised, and permanently disabled. There was evidence that fast driving was the primary cause of the accident. *Held*, that it was error to instruct the jury that they might, in their discretion, award exemplary damages. It seems to us, if there was evident misconduct on the part of the driver, it was the act of the company, and the jury should have given exemplary damages, such as would be likely to make other companies watchful in employing sober and prudent drivers, and such as would fully compensate the plaintiff for all damages, direct and incidental.

In *Southern Railroad Co.* v. *Kendrick*, 40 Miss. 374, it was held that a neglect of duty, clearly not attended with any circumstances of insult, or aggravation of feelings, or injury to the person or his property, or of bodily or mental suffering, would not justify vindictive damages; yet if there be any evidence tending to show such circumstances, its weight and force rest with the jury, whose verdict in awarding damages for such wrong will not be disturbed. And the court held as error a charge that "any failure to discharge all the duties imposed by the nature of the office of common carrier amounts to gross and wilful misconduct, for which punitive damages may be given." There could be no question of the entire soundness of this decision, inasmuch as the default might have, and probably did occur without any intentional wrong.

In an action by a passenger against a railroad company to recover damages, on account of the company's agent having conveyed the plaintiff to a point beyond the place of his destination, and then compelling him to leave the cars, the jury are authorized to allow not only just compensation for the injury, but to inflict proper punishment on the defendants for their disregard of public duty; and in such case they may take into consideration the pecuniary circumstances of the defendant company: *New Orleans, &c., Railroad* v. *Hurst*, 36 Miss. 660.

The decision in this case is certainly expressed in most unfortunate language. The plaintiff was certainly entitled to be fully indemnified against all loss, direct and incidental, and it was proper for the jury to award such damages as might operate to correct the indifference of railway employees in such cases, and to make the company more watchful in selecting their agents. But "punishment" is certainly no function of a jury in civil cases, and what the pecuniary condition of the defendant has to do with the verdict in such a case is more than we can conjecture. The company is bound to pay the sum awarded, and if rich it is fortunate for both parties, and if very poor, it might prove unfortunate for both.

In *Heirn* v. *McCaughn*, 32 Miss. 1, an action against a common carrier, a violation of general duty to the public was regarded as sufficient to determine the character of the action as one founded in tort and not in contract, and to authorize the jury to award exemplary damages.

In this case a steamboat company had advertised to stop at a certain place, on certain days, for freight and passengers. The plaintiff, acting upon this notice, went with his wife to the appointed place at the time designated, and there waited for the boat until daybreak next morning, but the boat did not come, whereby the trip was lost to the plaintiff's wife,

who was detained there for several days thereafter. It was necessary for the parties to remain on the wharf, watching for the boat during the night, in order to get passage, and the wharf was a most inclement place at that time; the night being unusually cold, and the situation hard for the plaintiff's wife, from which she suffered pain and incurred injury. The jury on these facts awarded exemplary damages, and the Supreme Court sustained the verdict. This decision seems to have been substantially correct. A verdict awarding damages to the extent of what the plaintiff or his wife might have earned in the time would surely be nothing less than an insult.

In an action for damages by a passenger on a steamboat against the owner of the boat for injuries received by the explosion of a boiler, the plaintiff is entitled to recover for his bodily pain and suffering: *Swarthout* v. *The New Jersey Steamboat Company*, 46 Barb. 222. There can be no doubt of the correctness of the rule here laid down. The courts all agree in this.

I. F. R.

United States Circuit Court, District of Louisiana.

THE CITIZENS' BANK ET AL. *v.* OBER ET AL.

IN RE YORK & HOOVER, BANKRUPTS.

The general rule in the computation of time within which an act is to be done is to exclude the first day and include the last.

This is the rule prescribed by the Bankrupt Act, unless the last day happens to fall on Sunday, in which case that day is excluded also. In all other cases Sundays are counted as other days.

A proceeding in bankruptcy from the filing of the petition to the discharge or refusal to discharge the bankrupt is a single case, and is subject to appeal or writ of error as such, but there may be a large number of cases or questions arising in the course of it, and these may be the subject of review by the Circuit Court by writ of error or appeal or petition to review, according to their nature.

If the matter is a suit at law or in equity, or a dispute by the assignee of a creditor's claim allowed, or a claim by a creditor wholly or in part rejected, then it must be brought before the Circuit Court by writ of error or appeal.

But all other cases or questions arising in the progress of a case in bankruptcy fall within the supervisory jurisdiction of the Circuit Court, and must be brought before it by bill or petition to review.

The settlement of the status of a creditor's claim as to priority with respect to other liens is not the allowance or rejection of the claim meant by sect. 8, by which an appeal is given, and the proper mode of bringing such a matter before the Circuit Court is by petition to review.

An assignee made a sale of real estate of the bankrupt at which certain creditors purchased. The District Court confirmed the sale against the exceptions of other creditors, and made an order as to the priority of certain liens. *Held*, that this was a proceeding within the supervisory power of the Circuit Court, and should be brought before it by petition to review.